

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STATE OF MISSOURI,

Respondent

v.

ANDREW M.T. SAPIEN.

Appellant

DOCKET NUMBER WD69575

DATE: February 22, 2011

Appeal From:

Circuit Court of Platte County, MO
The Honorable Abe Shafer, IV, Judge

Appellate Judges:

Division Four
Thomas H. Newton, P.J., James Edward Welsh, and Alok Ahuja, JJ.

Attorneys:

William E. Shull, Jr., Liberty, MO

Counsel for Appellant,

Attorneys:

Terrence M. Messonnier, Jefferson City, MO

Counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI, Respondent, v.
ANDREW M.T. SAPIEN, Appellant

WD69575

Platte County

Before Division Four Judges: Thomas H. Newton, P.J., James Edward Welsh, and Alok Ahuja, JJ.

Andrew Sapien appeals his conviction for two counts of statutory sodomy in the first degree involving his sister and step-brother. Sapien makes three arguments: first, that the circuit court erroneously admitted testimony concerning an uncharged crime to explain a witness's delayed reporting of one of Sapien's offenses; second, that the circuit court erroneously admitted evidence concerning the disposition of a juvenile charge during the sentencing phase of Sapien's trial; and third, that the circuit court erroneously refused to dismiss the charges against him on the basis of prosecutorial vindictiveness.

AFFIRMED.

Division Four holds:

(1) The circuit court's decision to allow M.T.'s testimony regarding Sapien's prior rape of her did not constitute reversible error because Sapien failed to establish that he suffered sufficient prejudice to require a new trial. Evidence concerning this uncharged offense was exceedingly limited and was not highlighted during the testimony or arguments, and the evidence against Sapien was strong. There is no reasonable probability that the jury would have reached a different conclusion but for evidence of the uncharged offense.

(2) The circuit court did not err in allowing Sapien's juvenile court records into evidence during the sentencing phase of the trial. Although section 211.271.3, RSMo 2000, states that records of juvenile courts are not lawful and proper evidence against the child and shall not be used in any proceedings other than Chapter 211 proceedings, it did not control in this case. Sapien's juvenile adjudication for rape was admissible under a later and more specific statute, section 211.321.2(2), RSMo Cum. Supp. 2010, which provides that the record of a disposition of a juvenile case is public information to the same extent as records in criminal proceedings, if the juvenile was found to be delinquent based upon behavior that would have been a felony offense for an adult.

(3) The circuit court did not err in refusing to dismiss the charges against Sapien on the basis of prosecutorial vindictiveness. Pursuant to *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), and *United States v. Goodwin*, 457 U.S. 368 (1982), no presumption of vindictiveness arose from the State's charging Sapien with appropriate charges and then offering either to reduce the charges in the event of a guilty plea or to assert more severe charges if plea negotiations failed. Additionally, Sapien failed to establish actual vindictiveness.

Opinion by: James Welsh, Judge

February 22, 2011

Judge Thomas Newton concurs.

Dissenting opinion by Judge Alok Ahuja:

The author would hold that the trial court abused its discretion by admitting evidence of Sapien's uncharged rape of his step-sister M.T. Defense counsel did not "open the door" to this evidence by cross-examining M.T. concerning her delay in reporting Sapien's abuse of one of her siblings, because the prosecution had already elicited the same factual information on direct examination. In addition, the unfairly prejudicial effect of this evidence plainly outweighed its limited probative value, particularly where defense counsel offered not to argue any negative inference from M.T.'s delayed reporting in closing, and the prosecution offered to limit its redirect examination to only whether M.T. was scared of Sapien due to "something that happened" to her.

The admission of this evidence prejudiced Sapien and requires a new trial. The uncharged rape was strikingly similar to the crimes for which Sapien was on trial, created a significant risk that the jury would convict him based on the "legally spurious presumption" that he had a propensity to commit such offenses. Further, the State's evidence was not sufficiently strong to overcome the presumption of prejudice which exists where such other crimes evidence was admitted: there was no physical evidence, and the testimony of the two complaining witnesses, as well as M.T., was inconsistent in numerous material respects.

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